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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 440

GEORGIA HIGHWAY EXPRESS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner,

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, GEORGIA HIGHWAY EXPRESS, INC., respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 18, 1968.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix A, infra, pp. A1-A5) is not yet reported nor is the order of the Court of Appeals denying the Petitioner's petition for a rehearing (Appendix B, infra, p. A6). The findings of fact, conclusions of law and order of the Board (Appendix C, infra, pp. A7-A28; JA[1] pp. 291-309, 328-329) are reported at 165 NLRB No. 80.

JURISDICTION

The decision of the Court of Appeals was entered on April 18, 1968 (Appendix A, infra, p. A1). On May 28, 1968, the Court entered an order denying the Petitioner's petition for rehearing (Appendix B, infra, p. A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(c).

QUESTIONS PRESENTED

1. Whether, contrary to the provisions of Section 10 (c) of the National Labor Relations Act, the burden of proof may be shifted from the Board to a charged party following its presentation of a prima facie defense to an unfair labor practice charge?

2. Whether the Court below failed to follow this Court's decision in *N.L.R.B.* v. *Fleetwood*, 389 U.S. 375 (1967), by ruling that economic strikers are entitled to automatic and instantaneous reinstatement at the conclusion of the strike?

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1. "JA" refers to the Joint Appendix in the Court below.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Section 160(c), provides in pertinent part as follows:

> "If upon preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

STATEMENT OF THE CASE

The Company, a motor freight carrier, employed 215 dock workers at its Atlanta, Georgia, terminal (JA p. 166). At approximately 9:00 P.M. on April 12, 1966,[2] a strike ultimately involving 116 unorganized employees began and lasted until noon on April 13, 1966, when a majority of the strikers requested reinstatement. (JA pp. 8, 10-11, 19-20, 293, 294, 296-297.)

During the period from 9:00 P.M. on April 12 until noon of the following day, 75 replacements were either hired or permanently transferred into the vacant dock workers' positions (JA p. 175). The Company changed its break bulk points (points where less than truck load shipments of freight were transferred between truck trailers) so as to re-route freight around Atlanta to alleviate the effect of the strike (JA pp. 168-169). Since the Company had 174 employees working at the end of the strike and it could not accurately determine the number of job vacancies existing

2. Unless otherwise noted all dates referred to are in 1966.

without evaluating the effect of the strike and the changing of its break bulk points, the Company did not begin reinstating strikers until April 18, 1966.[3] (JA pp. 15, 168, 172-174; Res. Exh. 1-6.)[4]

The Company's Vice President and Atlanta Division Manager, Richard J. Young, testified as to the 75 replacements obtained during the strike. (JA p. 15) Properly authenticated summaries of employee personnel records[5] were introduced verifying the hiring and/or transfer of replacements to the Company's Atlanta terminal. While the personnel records from which the Company's exhibits were prepared do not indicate the hour an employee is hired, Company officials testified that no replacement had been hired prior to 6:30 P.M. on April 11 or after noon on April 13 (JA pp. 88-92, 123-124, 126, 167).

The only witnesses called by the General Counsel to rebut the defense of the Company as to the employment of replacements was a striker, Willie Hamm. Hamm stated that during his fourteen hours from 9:00 P.M. until 11:00 A.M. on the picket line he did not remember seeing any strange faces entering the Employer's unfenced facility which was 750 feet on one side (JA pp. 211-212, 219-220). On cross-examination, Hamm admitted he could not see those entering the main truck entrance which was about 750 feet from where he was situated; that he could not estimate the number of people going to work at the terminal; that he could not see people who entered the dock employees' entrance and that he normally enters work from such a direction that he does not normally see pick up and delivery drivers (JA pp. 221-223).

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3. By April 21, 1966, 48 of the strikers had been reinstated (JA p. 173).

4. "Res. Exh." refers to Company Exhibits.

5. Res. Exh. Nos. 1-A, 1-F and 1-G.

In his decision, the Trial Examiner concluded that the Company's evidence did not establish (1) that any particular number of replacements had been hired before noon on April 13; (2) that arrangements had been made by that hour for any particular number of transfers; and (3) that any particular number of transfers were offered and accepted on a permanent basis (Appendix C, infra, p. A20). He supported these conclusions by pointing out that the "reliable testimony" by Hamm for the General Counsel shows that he did not remember having seen anyone unfamiliar to him enter the Respondent's premises (Appendix C, infra, p. A20, Note 10). He also noted that "if the Respondent had brought 75 individuals to the terminal as dock employees, surely some of that large number would have been observed by Hamm." (Appendix C, infra, p. A20, Note 10). The Trial Examiner further stated that it was a "reasonable inference" that the Company's failure to produce the time cards of the employees involved and to call Personnel Director Hauswirth or any transferees as witnesses was because this evidence would have contradicted the Company's other evidence (Appendix C, infra, p. A20).

The Board in adopting the Examiner's decisions pro forma held that at the time the strikers requested reinstatement there did exist job vacancies as dock workers and that the Company violated Section 8(a)(1) of the Act by failing to promptly fill such vacancies because of its hostility towards the strikers and its desire to discipline them (Appendix C, p. A27). The Board ordered the Company to cease and desist from delaying reinstatement of or refusing to reinstate strikers; to offer reinstatement to all unreinstated strikers; and to reimburse them for all loss of earnings from April 13, 1966, to the date of an offer of reinstatement (Appendix C, infra, p. A28).

On June 20, 1967, the Company filed a Petition to Review and Set Aside the Board's Order in the above case pursuant to Section 10(e) of the Act, while the Board filed a cross petition for enforcement. The Court of Appeals confirmed the Board's findings in its April 18, 1968, decision and granted enforcement of the Board's Order in its judgment of the same date (Appendix A, infra, p. A4). On May 3, 1968, the Company filed a Petition for Rehearing in the case which was denied by the Court on May 28, 1968 (Appendix B, infra, p. A6).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Section 10(c)[6] of the National Labor Relations Act so as to deprive an employer charged with unfair labor practice of the protection guaranteed by the Act.

1. The statutory assumption of the burden of proof is acknowledged by the Board's own *Statements of Procedure, Series 8 as amended,* wherein Section 101.10(b) states: "The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act."[7] Thus, the burden of proof on an unfair labor practice charge rests on the Board and it is at no time shifted to the party charged with an unfair labor practice. *Cedar Rapids Block Company* v. *N.L.R.B.*, 332 F.2d 880 (C.A. 8, 1964). This Court has recognized the "burden of proof"

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6. ". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the Complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." . . .

7. The Petitioner was alleged to have violated Section 8(a)(1) of the Act.

or more accurately called the "burden of persuasion" does not shift, it rests throughout the case as to each issue on the party originally having the burden as to such issue. *Commercial Molasses Corporation* v. *New York Tank Barge Corporation,* 314 U.S. 104 (1941).

While the "burden" of proof does not shift, the burden of going forward with evidence does pass from party to party. *Preferred Acc. Ins. Co.* v. *Crasso,* 186 F.2d 987; 31A C.J.S., Sec. 103. This distinction is recognized by the Second Circuit Court of Appeals in *National Labor Relations Board* v. *Mastro Plastics Corp.,* 354 F.2d at 175-176, wherein it stated:

> "The main issue in this case, whether the Board" (the Petitioner in the instant case) "must introduce evidence of the job availability at respondent's plants does not involve the ultimate burden of proof, but only the burden of producing evidence."

When evidence is introduced by the party having the burden of proof sufficient to support a finding of truth of his assertion such evidence does not shift the burden of proof; it merely puts the adversary to the necessity of producing evidence to meet the prima facie case. *Smith* v. *Hill,* 232 Mass. 189, Aff'd 260 U.S. 592. Thus, the court in *Cedar Rapids Block Co.* v. *N.L.R.B., supra,* finding the charged party had introduced a prima facie defense, ruled: "To sustain such a burden (of proof) the Board must introduce evidence sufficient to outweigh the charged party's defensive evidence."

In the instant case the decision below fails to distinguish between the burden of proof (persuasion) and the burden of going forward with evidence. This Court in a case of *N.L.R.B.* v. *Great Dane Trailers,* 388 U.S. 26, 34 (1967), held that "unless the employer who refuses to reinstate strikers can show that his action was due to

'legitimate and substantial business' justification; he is guilty of unfair labor practice;" and that "the burden of proving justification is upon the company." The Petitioner presented evidence of the permanent replacement of 75 strikers by both oral testimony and by exhibits prepared from official employee personnel files which could be considered no less than a prima facie defense[8] to the unfair labor practice charge. Once such a defense is raised the Board's general counsel has the burden of coming forward with evidence to overcome the defense, *N.L.R.B.* v. *Plastic Applicators*, 369 F.2d 495 (C.A. 5, 1966).

The decision below incorporated the Board's and Examiner's unfavorable entrances from the Petitioner's failure to present collaborating evidence and testimony regarding employee replacement as well as the conclusion that such testimony or exhibits would have been inconsistent with the Petitioner's defense (Appendix A, infra, p. A4). The Seventh Circuit Court of Appeals in the case of *Alton-Arlan's Department Store, Inc.* v. *N.L.R.B.*, 355 F.2d 513 (C.A. 7, 1966) stated in a like situation that the burden of proof rested with General Counsel to prove the unfair labor practice charge and not with the Employer and that by implying that an uncalled defense witness would contradict other defense witnesses was in effect improperly shifting the burden of proof from the General Counsel to the charged party.

The Board and the Court below in failing to distinguish between the duty of going forward with evidence and the ultimate of persuasion of proof has departed from established legal principles and is in conflict with the decision

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8. Prima facie evidence is a minimum quantity and is that which is enough to raise a presumption of a fact or sufficient if not rebutted to establish the fact. *Otis and Company* v. *Securities and Exchange Commission*, 85 App. D.C. 122, 176 F.2d 34, Reversed 338 U.S. 843, Rehearing Denied 338 U.S. 888.

of the Eighth Circuit Court of Appeals in *Cedar Rapids Block Co.;* the Second Circuit in *Mastro Plastics;* and the Fifth Circuit in *Plastic Applicators* to such extent that review by this Court is required.

2. The Court below failed to follow this Court's decision in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc., supra,* wherein it was recognized that frequently a strike affects the level of production of an Employer and the number of jobs available; and that striking employees sometimes apply for reinstatement immediately after the end of the strike before full production is resumed. (See also *Philanz Oldsmobile, Inc.,* 137 NLRB 867 at 871.) In *Fleetwood* this Court stated:

> "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement."

An Employer is not required to hire unneeded strikers at the end of a strike, *N.L.R.B.* v. *MacKay Radio and Telegraph Company,* 304 U.S. 333, 345-346 (1938).

The Board expressly chose to ignore testimony and exhibits presented by the Company showing the disruptive effect of the strike on its production tonnage which would justify a four day delay in recalling strikers[9] (JA 302). Instead of considering the evidence, the Board erroneously concluded that because the Company called back 48 of the strikers within eight days of the termination of the strike there consequently must have been jobs available at the end of the strike (JA 302).

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9. On the date of the strike, April 11, 1967, there were 215 dock workers at the Company's Atlanta Terminal. At the conclusion of the strike at noon, April 13, 1967, 174 workers were employed.

In so ruling the Board and Court below are in conflict with this Court's mandate in *Fleetwood* that *"If and when* a job for which the striker qualified becomes available he is entitled to an offer of reinstatement." (Emphasis added) There exists no other method by which an Employer can establish the nonavailability of a job other than to present evidence. For the Court below to disregard such evidence places an Employer in the intolerable position of having to either hire unneeded strikers at the end of an economic strike, contrary to this Court's decision in *MacKay*, or to be found guilty of an unfair labor practice charge of failing to establish a "legitimate and substantial business justification" for not reinstating economic strikers under this Court's *Great Dane Trailers* decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILSON, BRANCH AND WILCOX

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APPENDIX

APPENDIX "A"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,082

TRUCK DRIVERS AND HELPERS LOCAL No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

GEORGIA HIGHWAY EXPRESS, INC.,
Intervenor

No. 21,272

GEORGIA HIGHWAY EXPRESS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

TRUCK DRIVERS AND HELPERS LOCAL No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

On Petition for Review of and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

Decided April 18, 1968

Mr. Robert L. Mitchell, with whom *Mr. Herbert S. Thatcher* was on the brief, for petitioner in No. 21,082 and intervenor in No. 21,272.

Mr. John W. Wilcox, Jr., with whom *Mr. Alexander E. Wilson, Jr.,* was on the brief, for petitioner in No. 21,272 and intervenor in No. 21,082.

Mr. Morton Namrow, Attorney, National Labor Relations Board with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Elliott Moore,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Before EDGERTON, *Senior Circuit Judge,* and DANAHER and MCGOWAN, *Circuit Judges.*

EDGERTON, *Senior Circuit Judge:* These cases arose out of events which followed a work stoppage by some 116 employees of Georgia Highway Express (the Company) on the evening of April 12 and the morning of April 13, 1966. Most of these employees unconditionally asked for reinstatement at noon on April 13.

The National Labor Relations Board (the Board) found that the Company violated section 8(a)(1) of the National Labor Relations Act[1] by refusing or delaying reinstatement of the strikers upon their unconditional request. In No. 21,272 the Company seeks review of this decision, contending that it had hired replacements for most of the strikers before noon of April 13.[2] In the same proceedings the

1. 29 U.S.C. § 158(a)(1).

2. The Company did not claim to have hired replacements for all of the strikers. It contends that because of uncertainty due to the strike and re-routing of certain freight it did not immediately need as many employees as before. Forty-eight men who had not worked during the strike were reinstated within 8 days after it ended. Within a few months most strikers returned to their jobs.

Board refused to find that the Company violated Section 8(a)(3) of the Act also. In No. 21,082, Truck Drivers and Helpers Local No. 728 (the Union) seeks review of this decision.

No. 21,272

The Supreme Court recently said in *NLRB* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967): "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.*"

If the Company could show that the replacements were hired before noon on the 13th, this would establish a "legitimate and substantial business justification." See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The trial examiner and the Board, which adopted his findings, found that the Company failed to meet this burden.

The only direct evidence on the time of the new hirings was the testimony of Company officials, Wilder and Young, and a striking employee, Willie Hamm. The Company introduced exhibits based on its personnel records which showed that new employees were hired on April 12 and 13, but did not show the times. Young, the Company's Terminal Manager, testified that no one was hired after noon of the 13th and that he, on advice of counsel, had ordered hiring stopped at that time. Wilder, the Assistant Superintendent, testified that most of the replacements reported for work by noon of the 13th. Hamm testified that he did not remember seeing any unfamiliar faces between the time of the walk-out and noon the following day. He also said that from his vantage point across the street from the normal dock employee entrance he had observed no new

men entering or leaving the Company's premises during the strike.

The trial examiner, in determining that the Company had failed to show that 75 replacements were hired before noon, only partially relied on Hamm's rebutting testimony. He also inferred from the Company's failure to introduce the time cards of the new employees that they would have been inconsistent with the defense.[3] The trial examiner apparently drew equally unfavorable inferences from the Company's failure to call any supervisory employee to confirm Young's order to stop hiring at noon, or to call any of the transferees or replacements.

This brief review of the record shows that substantial evidence supports the Board's conclusion that there were vacancies when the applications for reinstatement were made at noon on April 13. We therefore affirm.

No. 21,082

In order to find an employer guilty of a Section 8(a)(3) violation, it must appear that the Company discriminated against employees "to encourage or discourage membership in any labor organization." There is no evidence in

3. The time cards show when an employee begins work, but not when he was hired. In his report the trial examiner alluded to the fact that a requirement of a physical examination was waived to permit newly hired personnel to begin work immediately, and said "the initial timecard of each replacement, if it had been produced, would have had substantial probative value on the hour of hire. For instance, the initial cards of all replacements who worked on April 12 and before noon on the 13th would have established their hire prior to that noon. The initial timecards of replacements who began work after that noon, if few in number, would have meant that the Respondent needed few witnesses to establish its defense that all were hired before that noon." The mere fact that they were stamped after noon does not, of course, conclude the Company, because hirings might have been made before noon, with the men hired reporting for work after noon. We note that the Company's witness Wilder testified that most of the replacements *reported to work* by noon on the 13th.

the record that the Company had notice of the Union's interest before it received a telegram from a union official at 3:00 p.m. some three hours after the Company's alleged anti-union conduct. The Board's determination that the Company did not violate Section 8(a)(3) is clearly correct. We therefore affirm.

No. 21,272 *affirmed.*
No. 21,082 *affirmed.*

APPENDIX "B"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967

No. 21,272

Georgia Highway Express, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

Truck Drivers and Helpers Local Union No. 728, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,
Intervenor.

Before: Edgerton, Senior Circuit Judge; Danaher and McGowan, Circuit Judges, in Chambers.

ORDER

(Filed May 28, 1968, United States Court of Appeals for the District of Columbia Circuit. Nathan J. Paulson, Clerk.)

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam.

APPENDIX "C"

United States of America.

Before the

NATIONAL LABOR RELATIONS BOARD,
Division of Trial Examiners,
Washington, D. C.

GEORGIA HIGHWAY EXPRESS, INC. and TRUCK DRIVERS AND HELPERS LOCAL UNION 728.	Case 10-CA-6581.

Maynard H. Jackson, Jr., Esq., of Atlanta, Ga., for the General Counsel.

John W. Wilcox, Jr., Esq. (Wilson, Branch, Barwick & Wilcox), of Atlanta, Ga., for the Respondent.

Robert L. Mitchell, Esq., and Mr. Billy Waters of Atlanta, Ga., for the Union.

Before A. Bruce Hunt, Trial Examiner.

TRIAL EXAMINER'S DECISION.

Statement of the Case.

This proceeding, in which the charges were filed on June 13, July 19, and September 22, 1966, and the complaint was issued on October 5, 1966, involves allegations that the Respondent, Georgia Highway Express, Inc., violated Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 29 U. S. C., Sec. 151 *et seq.* On November 28, 29 and 30, 1966, I, Trial Examiner A. Bruce Hunt, conducted a hearing at Atlanta, Georgia, at

which all parties were represented by counsel.[1] Thereafter, all parties filed briefs. The Respondent's motion to dismiss is disposed of in accordance with the determinations below. Upon the entire record and my observations of the witnesses, I make the following:

Findings of Fact.

I. Jurisdiction

The Respondent, a Georgia corporation, is a common carrier of interstate and intrastate freight by motor vehicle. It operates a terminal at Atlanta, Georgia, and it annually receives in excess of $50,000 from the transportation of interstate freight. There is no dispute, and I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Union.

Truck Drivers and Helpers Local Union 728 is a labor organization which admits to membership employees of the Respondent.

III. The Unfair Labor Practices.

A. The Issue.

On April 12, 1966, employees who worked on the dock of the Respondent's Atlanta terminal commenced a strike. It was not caused by unfair labor practices. Less than 18 hours later, the strike ended and the employees applied unconditionally for reinstatement. The applications were not granted until the following week or later, however, and the principal question is whether the Respondent had

1. The transcript, at page 238, line 18, does not correctly identify the speaker. The transcript is hereby corrected so that line 18 will begin: "Mr. Wilcox:"

filled the jobs of the strikers with permanent replacements, as the Respondent contends, or whether the Respondent refused to reinstate strikers *promptly* because of their concerted and union activities, as the General Counsel and the Union contend. At this point it may be noted that, when the strike began, no employee was a member of the Union insofar as appears.

B. The Events.

During late March 1966, approximately 75 employees on the Atlanta dock ceased work and sought a conference with management. They talked with Charles Stewart, who was then operations manager at the terminal, and he suggested that they return to work and select several of their number to present their grievances. A committee of six, including Willie Hamm and Willie Dorsey, was designated and it met twice with Stewart, Brown Wilder, Stewart's assistant, and Richard J. Young, then Atlanta division manager. At the initial meeting, members of the committee asserted that some employees were being underpaid, that the men were working long hours without overtime, that job opportunities were limited, and that there had been harassment by supervisors. At the second meeting, which took place a few days before April 12, members of the committee expressed the view that management had not remedied the grievances and said that the employees remained dissatisfied.[2]

On April 12, the Respondent had 215 dock employees in Atlanta who worked on three shifts, one starting at 1 a. m., another between 8:30 and 9:30 a. m., and the third at 6 p. m. Sometime after 6 p. m. on April 12, employees on the dock started walking off the job without

2. These findings are based upon Hamm's uncontradicted testimony.

prearrangement or notice to the Respondent, insofar as appears. Hamm testified that he walked out and punched his timecard at 7 p. m. Dorsey testified that he punched his card between 6:30 and 7 p.m. Young testified for the Respondent that some employees left their jobs at about 8:45 p. m. A total of 49 ceased work. Somewhat later, Hamm spoke with Young, saying that he did not know why the men had done so and offering to attempt to persuade them to return to work. According to Hamm, he knew some of the reasons for the walkout, but he did not know "what had triggered it." At 8:40 p. m., Young spoke to the strikers, saying that work would begin at 8:45 p. m., that those men who wished to resume work could do so, and, as to the remainder, that it had "been nice seeing you."[3] None of the men resumed work. Instead, they made signs reading "On strike" and "Georgia Highway Unfair to Labor," and began to picket. The Respondent, in turn, began to seek replacements. According to Young, he communicated with the Respondent's counsel, Attorney Wilcox, who advised him that night to replace the strikers. Young testified further that he asked several persons to seek replacements, that he asked supervisory employees to telephone other terminals of the Respondent in efforts to obtain replacements and to route freight around Atlanta, and that some of the local pickup and delivery drivers were assigned to dock work for an undisclosed period of time.

The number of pickets at any time was limited, at the request of local police, to five or six men at each of two entrances to the Respondent's terminal. Within a few hours, men on the 1 a. m. shift reported for work, and still others reported for the shift beginning work about 8:30 a. m. A total of 66 men on these two shifts did not

3. Young acknowledged having so spoken to the strikers.

cross the picket line on April 13. Other men on those two shifts crossed the line and went to work.[4]

About 2 a. m. on April 13, two drivers for another carrier passed the terminal and noticed the picketing and the large number of men outside. They stopped and talked with the committee of six who had been designated by the employees during late March. Later during the night, arrangements were made for the strikers to visit the union hall after daybreak. About 9 a. m., a few more than 100 strikers went to the hall, leaving Hamm, another committeeman, and a few strikers to maintain the picket line. All or nearly all of the men signed authorization cards or applications for membership, and Hamm signed an authorization card later that morning. While at the hall, the men were advised to apply for reinstatement, and Albert J. Johnson, an official of the Union, dispatched by telefax to Western Union a telegram for delivery to the Respondent. In the telegram, Johnson asserted that the Union represented a majority of employees in an appropriate unit and requested a meeting at which to bargain concerning the work stoppage and conditions of employment. At 11:40 a. m., Western Union began to process the telegram by sending it from an outlying office to a downtown office as a step toward delivery to the Respondent. At approximately the same time, the men, accompanied by Johnson and another representative of the Union, went to the site of the picketing where the men discussed the matter of applying for reinstatement. As will appear momentarily, the strikers sought reinstatement at approximately noon, but there is no

4. Two employees who did not cross the picket line, Wilber Harris and Ralph Shropshire, testified for the Respondent that they did not join the strike and that they refrained from crossing the picket line because of fear. It is clear from their testimony, however, that they did not talk with any striking employee and that their fear was not based upon any invalid conduct by striking employees.

evidence that the Respondent received the telegram prior to the request for reinstatements or that anyone told the Respondent of the Union's interest. In particular, the two representatives of the Union did not make their presence at the site known to the Respondent.

Shortly before noon, across the street from the terminal the strikers decided to terminate the strike and to seek reinstatement. By a show of hands, Hamm was selected to make the request. Hamm then went to the terminal, followed by the men. He talked with Young and Dillon Winship, Jr., who was then the Respondent's vice president. Hamm said, according to Young, "We are ready to return to work unconditionally" and someone else said "that 55 hours was too long for overtime." Young and Winship conferred privately, following which Young told the men that the Respondent's attorney was out of town, that counsel would not return until that evening, and that Young could not tell the men anything at that time. Neither Young nor Winship said anything to the strikers about their having been replaced, and Young testified that he did not know whether a vacancy existed as of the time of the applications for reinstatement. In respect to Young's testimony that he told the men that the Respondent's attorney was out of town, the Respondent's brief recites twice that the member of Wilson, Branch, Barwick & Wilcox who handles legal matters for the Respondent is Wilcox, and Young testified that Wilcox was indeed out of town on April 13 and did not return until about 8:30 p. m. On the other hand, Young testified also that at noon on that day he was advised by counsel not to hire any more replacements. Young did not explain how he had conversed with an attorney who was out of town or whether, in the same conversation, anything had been said concerning the reinstatement of strikers.

As will appear, the Respondent contends that as of noon on April 13, when the strike ended and applications for reinstatements were made, it had 174 dock employees, that number being the sum of 75 replacements and 99 nonstrikers, that 174 represented a drop of 41 from the number of dock employees at the time the strike began, and that there was no need to fill any of the 41 jobs as of noon on April 13.

On April 14, Wilcox responded to Johnson's telegram, saying *inter alia* in a letter that he questioned the appropriateness of the unit and the Union's majority status, that there were "numerous questions concerning the present status of employees or former employees who [were] no longer working at the" terminal, and that the Respondent would not recognize the Union. There is no allegation here that the Respondent refused to bargain collectively.

Within the next 3 days, the Respondent decided that it needed additional dock employees. Letters were mailed, and telephone calls were made, to employees who had not worked during the strike, and such employees were selected by the Respondent on the basis of length of service in certain classifications. The record does not contain any letter, or copy thereof, that was mailed to any employee, but it is clear that on April 17, a Sunday, Hamm received a telephone call from an office employee, a Miss McKee or McGee. She said in substance that he was being offered reinstatement on his regular shift for the next day and that if he did not report for work the Respondent would assume that he no longer wanted to work for it.[5] Hamm reported for work and was reinstated. During the period of April 18 through 21, 48 employees who had not worked during the strike were

5. Hamm so testified without contradiction. McKee or McGee was not a witness.

reinstated. Adding 48 and 174 (the latter being the number of dock workers at noon on April 13, according to the Respondent's contentions), gives a total of 222, seven more than the 215 who were on the payroll when the strike began.[6]

Upon the reinstatement of the last of the 48 employees on April 21, the Respondent "had a full complement to handle the freight," according to Young. Thereafter, as vacancies occurred, reinstatements were offered to other employees who had not worked during the strike. In particular, such reinstatements were offered during the period of July 7 through November 1, and Young testified further that to "the best of [his] knowledge" all persons who had not worked during the strike had "been offered an opportunity to return if they could qualify for the job that was open." As recited, the record does not contain an original or copy of any letter offering reinstatement to anyone, nor is there evidence to establish the number of letters and the number of oral offers.[7] On the other hand, at an undisclosed time the Respondent decided that reinstated employees would not suffer a loss of seniority or other rights or privileges. Young testified concerning the 48 men who were reinstated on April 18 through 21 that the Respondent "did not feel as though they had been out long enough" to warrant any such loss. The

6. There is a suggestion in a question by Attorney Wilcox to Young that between April 13 and 21 some dock employees quit or were discharged, thereby giving a total less than 222. Young answered, "That is true." The record, however, does not disclose the names of employees who quit or were discharged during that period. Moreover, the Respondent's exhibits contain lists of individuals who, according to the Respondent's contentions, were employed as of particular dates, but there is no list of all dock employees as of April 21.

7. Dorsey, a witness for the General Counsel, testified that during July he received a registered letter from the Respondent which said that, if he desired to return to work, he should notify the Respondent within 7 days. Dorsey accepted reinstatement.

General Counsel, contending that there had been invalid refusals to reinstate strikers on April 13 and questioning whether offers of reinstatement fulfilled the Respondent's alleged obligations, nevertheless does not contend that any reinstated employee suffered any loss of accrued rights or privileges.

C. The Respondent's Evidence That Most Strikers Had Been Replaced Before Noon on April 13 and That There Was No Work Then for the Remainder.

As we have seen, the strike was an economic one, not the result of unfair labor practices. Therefore, the Respondent was free to replace the strikers at any time prior to their unconditional applications for reinstatement, *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S. Ct. 904 (1938). On the other hand, if there was need for their services at the time of such applications, the Respondent was not free to refuse or delay reinstatements because the employees had engaged in the strike. The Respondent contends that it replaced 75 strikers prior to the time of the applications for reinstatement, that the replacements coupled with 99 non-striking dock employees totaled 174, that the total was 41 less than the number of dock employees when the strike began, and that, partly because some freight was being routed around Atlanta, there was no need to reinstate any of the strikers at the time of their applications. These contentions constitute an affirmative defense and the Respondent has the burden of establishing it. *New Orleans Roosevelt Corporation*, 132 NLRB 248, 250. Additionally, the Respondent must show that the men who replaced the strikers were regarded by themselves and the Respondent as having received their jobs on a permanent basis. *Hot Shoppes, Inc.*, 146 NLRB 802, 804.

Of the 75 individuals whom the Respondent characterizes as "permanent replacements hired for Atlanta terminal dock on April 12, and prior to noon on April 13, 1966," 21 were transferees from other operations of the Respondent, and 2, Joe Gaston and D. L. Jones, were hired before the strike began and, therefore, were not hired as replacements. Subtracting 21 and 2 from 75 leaves 52, and the initial question is whether the Respondent proved that none of the 52 men was hired after noon on April 13. The exhibits contain the names of the 52 men and a chart showing their inclusion with the other 23 persons whom the Respondent calls "permanent replacements." Wilder testified for the Respondent that he prepared the exhibits with the aid of a typist and that his preparation was based upon the personnel files of the 75 men. Those files were produced at the hearing for examination by counsel for the General Counsel and the Union. Wilder testified further that in preparing the exhibits he did not examine any record which would show the hour of hire of any man because no such record exists, and that, "[a]s far as" he knew, a majority of the 75 replacements began work at the Atlanta terminal prior to noon on April 13. Young testified for the Respondent that no one was hired as a replacement after noon on April 13, but he did not examine records and his testimony appears to be based upon his other testimony that, upon advice of counsel at noon on the 13th, he gave an order that no one else be hired. There is no testimony by any supervisory employee that he received such an order from Young, and none of the replacements was a witness to testify to having been hired before noon on April 13.

The Respondent possesses timecards for each of the replacements, but the cards were not produced at the

hearing. According to the Respondent, the initial card for each replacement was relevant to the hour he commenced work, not to the hour of hire. This contention is not persuasive. Wilder described the scene at the terminal during the strike as "pretty furious", so much so that he did not know what was "going on a lot of the time", and the record is clear that the Respondent took various steps to obtain replacements. A practice that each prospective employee must have a physical examination before commencing work was suspended when the strike began, and the suspension was intended to enable a newly hired person to go to work without delay. Therefore, the initial timecard of each replacement, if it had been produced, would have had substantial probative value on the hour of hire. For instance, the initial cards of all replacements who worked on April 12 and before noon on the 13th would have established their hire prior to that noon. The initial timecards of replacements who began work after that noon, if few in number, would have meant that the Respondent needed few witnesses to establish its defense that all were hired before that noon.

Turning to the 21 transferees, one of them, Gary Chandler, was transferred from a job at the Atlanta terminal to another job there, and the remaining 20 appear to have been transferred from other terminals in the Respondent's operations. On May 20, one transferee Don Arnold, quit. On July 18, approximately 3 months after the strike, 16 of the transferees were transferred back to their original terminals and on August 2 another transferee was returned to his original terminal. Chandler and two other transferees remained in Atlanta. The questions involving the transferees are whether their transfers were arranged prior to noon on April 13 and

whether the transfers were intended to be permanent. Wilder was asked to relate the circumstances under which individuals were transferred and he answered that he believed that the transfers had been on a permanent basis. His belief has no probative value, however, because he testified further that he had nothing to do with any of the transfers. Young testified that he asked the Respondent's personnel manager, one Halsworth, to contact out-of-town terminals in an effort to arrange transfers and that "[t]o the best of [Young's] knowledge" nine terminals in Georgia, two in Alabama, and one in Tennessee were contacted. Halsworth was not a witness, however, nor was any of the 21 transferees, and there is no evidence of probative value which will enable me to determine the details surrounding any of the transfers. Young testified further that some of the transferees came from terminals in Albany and Macon but that he did not know whether anyone had been hired in either of those cities to replace a transferee. Indeed, there is no evidence that any transferee was replaced at any terminal. Finally, according to Young, he "would assume" that the Respondent paid the room and board in Atlanta for "around 20 or 22" transferees for a period of time, the length of which he did not know, and that the facts were known to Clint Packard, the Respondent's treasurer. Packard did not testify. The above factual recital dictates the conclusions that the Respondent has not established that (1) a particular number of transfers were arranged prior to noon on April 13 and (2) any definite number of the transfers was made on a permanent basis.

We turn now to the Respondent's evidence concerning a decrease in the amount of freight handled at the Atlanta terminal. There is a graph showing tonnage handled in Atlanta during most of 1966 as compared with a corre-

sponding period in 1965, and another graph showing tonnage handled during a portion of 1966 at other terminals as a means of routing freight around Atlanta. There also is evidence that during certain weeks between April 8 and October 28, 1966, the freight handled at the Atlanta terminal varied from a high of approximately 28 ¼ million pounds or tons for the workweek ending April 8 to a low of approximately 26 million pounds or tons at a later date.[8] I do not believe that this evidence need be discussed further. This is so because, as we have seen, regardless of the tonnage the Respondent's need for additional employees was such that 48 men who had not worked during the strike were reinstated within 8 days after the strike ended.

D. Conclusions.

I conclude that, when applications for reinstatement were made at noon on April 13, there were vacancies for dock employees and that the Respondent failed to fill such vacancies promptly because of its hostility toward employees who had gone on strike and its desire to discipline them for having engaged in concerted activity. The facts that, within 4 days after the end of the strike, the Respondent began offering reinstatement to employees who had not worked during the strike and that the number of such reinstatements reached 48 by April 21 are very persuasive that at noon on April 13 the Respondent's officials knew that it did not have enough dock workers to handle the volume of freight.[9] Moreover, the Respondent's evi-

8. One of the Respondent's exhibits is captioned "Tonnage in Millions" and Wilder testified that certain figures "represent tons in millions." On the other hand, the Respondent's brief says that the figures represent "pounds of freight."

9. Young testified that after April 13 and before April 18 the Respondent sought to determine (1) the effect which the strike would have upon its business and (2) the number of dock

dence does not establish (1) that any particular number of replacements had been hired before that noon, (2) that arrangements had been made by that hour for any particular number of transfers, and (3) that any particular number of transfers were offered and accepted on a particular basis.[10] It is a reasonable inference that the Respondent's failure to produce the timecards and to call Halsworth and any transferee as witnesses was because the timecards and the testimony would have been inconsistent with the defense. *Borg-Warner Controls,* 128 NLRB 1035, 1044-45.[11]

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employees it would need. This testimony does not persuade me that at noon on April 13 the Respondent's officials believed that there already were enough dock employees at work. Moreover, Young impressed me unfavorably at times during his testimony.

10. There is reliable testimony by Hamm for the General Counsel that he was present at the site of the picketing from about 9:15 p. m. on April 12 to about 11:00 a. m. on the next day, that he observed the entrance used by office employees and dockworkers, and that he did not remember having seen anyone whose face was unfamiliar to him enter the Respondent's premises. Hamm's testimony has weaknesses in that he could not see one entrance to the terminal and all parts of the dock, and it may be unlikely that many persons hired as replacements would have used an entrance which would have necessitated crossing the picket line. On the other hand, if the Respondent had brought 75 individuals to the terminal as dock employees, surely some of that large number would have been observed by Hamm.

11. In its brief, the Respondent contends that certain assertions by counsel for the General Counsel "should not affect the weight given to the Respondent's Exhibits because he did not act on the Trial Examiner's repeated offers to have the documents produced . . ." During the hearing I told counsel for the General Counsel that, upon his request, I would direct counsel for the Respondent to produce any and all documents upon which the Respondent's graphs and chart had been based. Wilder testified, however, that he had not used timecards in preparing any of the Respondent's exhibits. At another point during the hearing, it developed that the General Counsel had issued a *subpoena duces tecum* in an unsuccessful effort to examine the timecards. I suggested that we not discuss the subpoena because, the hearing having been underway, I would entertain a motion by counsel for any party that I request counsel for another party to produce records. Counsel for the General Counsel and the Union did not move that I request the production of the timecards because it was their position that such production was an essential element of the defense.

The Respondent's hostility toward the strikers is shown by Young's ultimatum to them at 8:40 p.m. on April 12 that he would give them 5 minutes within which to return to work and that, as to those who did not return then, it had "been nice seeing" them. Young's statement was clearly a threat that employees who continued on strike could not return to work for the Respondent.[12] In summary, I conclude that the Respondent, by refusing to reinstate strikers promptly after their applications, interfered with, restrained, and coerced them in the exercise of their Section 7 rights, thereby violating Section 8 (a) (1). I need not reach the question whether there also were violations of Section 8 (a) (3) because any finding of such a violation, or the absence thereof, would not alter substantially the remedy set forth below. I note, however, that the factual recital above shows that the Union's notification to the Respondent of its interest came after the Respondent's refusals to reinstate strikers at noon on April 13 and that I doubt that any reinstatement of a striker was delayed because of such notification.

IV. The Remedy.

Having found that the Respondent has engaged in unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and that it take affirmative action to effectuate the policies of the Act. Most of the striking employees have been reinstated, but I have

12. Young's statement was established during cross-examination of him by counsel for the Union. The statement was not alleged as a violation of Section 8 (a) (1) and I infer that it was not uncovered during the General Counsel's investigation of the case. I shall not consider it in formulating the Recommended Order below. I note, however, that "[t]o threaten the striking employees with discharge if they engaged in or refused to abandon lawful" concerted activity is a violation of Section 8 (a) (1), *Cusano d/b/a American Shuffleboard Co.* v. *N. L. R. B.*, 190 F. 2d 898, 902, 28 LRRM 2489, 2491 (C. A. 3, 1951).

found that some reinstatements were delayed invalidly because the men had engaged in concerted activities. I shall recommend that the Respondent make whole each of the reinstated employees for any loss of pay he may have suffered as a result of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of his reinstatement,[13] less his net earnings (*Crossett Lumber Company*, 8 NLRB 440, 497-98) during said period, the payment to be computed on a quarterly basis in the manner established in *N. L. R. B.* v. *Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344 (1953), with interest at 6 percent per annum, *Philip Carey Manufacturing Company* v. *N. L. R. B.*, 331 F. 2d 720 (C. A. 6, 1964).[14] Some employees have not been reinstated, and the record does not disclose whether the offers to them were proper or were similar to the 1 day's notice given to Hamm that he could return to work. See footnote 5 and accompanying text. I shall recommend that the Respondent offer employees who have not been reinstated immediate and full reinstatement to their former or substantially equivalent positions (*Chase National Bank of the City of New York*, 65 NLRB 827), without prejudice to their seniority or other rights or privileges, and that the Respondent make each of them whole in the manner provided above, the backpay period to be from the date of discrimination to the date of a proper offer of reinstate-

13. Harris and Shropshire, named in footnote 4, are not to be included in this recommendation.

14. Backpay for some employees will commence as of noon on April 13, 1966. Backpay for others may commence as of later dates. Questions concerning who is entitled to backpay, and when it shall commence and be tolled in any instance, are matters for determination in the compliance stages of this case.

ment.[15] I shall recommend additionally that the Respondent preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and the rights to reinstatement under the terms of these recommendations.

In view of the nature of the Respondent's invalid conduct and its underlying purpose and tendency, I find that the unfair labor practices found are persuasively related to the other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the course of the Respondent's conduct in the past. Therefore, in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend further that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in said section. *N. L. R. B.* v. *Express Publishing Company*, 312 U.S. 426 (1941); *N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4, 1941).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

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15. This provision is not intended to require the Respondent to offer reinstatement to anyone to whom it already has made a proper offer. During the compliance stages, the Respondent may show the details of offers made by it. Questions concerning backpay for anyone who has not been reinstated are to be determined during those stages. Additionally, if any employee to whom an offer of reinstatement is to be made should be serving in the Armed Forces of the United States at the time of the Respondent's compliance with the Recommended Order below, the Respondent shall notify him promptly of his right to full reinstatement upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended. Backpay to any such employee shall be tolled for the period of his military service.

Conclusions of Law.

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing employees in the exercise of their rights under the Act, the Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1) and 2 (6) and (7) of the Act.

Recommended Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, I hereby recommend that the Respondent, Georgia Highway Express, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Delaying reinstatement of, or refusing reinstatement to, employees because they engage in a lawful strike, or otherwise discriminating against them because of their concerted activities for mutual aid or protection.

(b) In any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to unreinstated employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make unreinstated and reinstated employees whole, in the manner set forth in "The Remedy" section of this Decision.

(b) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section.

(c) Post in conspicuous places at its terminal in Atlanta, Georgia, including all places where notices to employees customarily are posted, copies of the attached notice marked "Appendix."[16] Copies of said notice, to be prepared and furnished by the Regional Director for Region 10, after being signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for at least 60 consecutive days thereafter.[17] Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any material.

(d) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision what steps the Respondent has taken to comply herewith.[18]

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent violated Section 8 (a) (3) of the Act.

Dated at Washington, D. C., Mar. 16, 1967.

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16. In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

17. When the Regional Director prepares the notices, if offers of reinstatement are to be made to employees then serving in the Armed Forces, the Regional Director shall insert in the notices a provision whereby the Respondent notifies all employees that it will comply with its obligation set forth in the next to last sentence in footnote 15.

18. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Appendix.

Notice to All Employees.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not delay reinstatement or refuse to reinstate employees because they engage in a lawful strike.

We Will Not otherwise discriminate against employees because of their concerted activities for mutual aid or protection.

We Will Not violate any of the rights which you have under the National Labor Relations Act to engage in union or concerted activities or not to engage in such activities.

We Will, to the extent required by the National Labor Relations Board, reinstate employees who went on strike on April 12, 1966, and pay employees backpay to cover their losses because we did not reinstate them promptly.

GEORGIA HIGHWAY EXPRESS, INC.,
(Employer)

By .....
(Representative) (Title)

Dated: .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street, N. E., Atlanta, Georgia 30323, Telephone 526—5760.

United States of America.
Before the
NATIONAL LABOR RELATIONS BOARD.

GEORGIA HIGHWAY EXPRESS, INC., and TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728.	Case No. 10-CA-6581.

DECISION AND ORDER

On March 16, 1967, Trial Examiner, A. Bruce Hunt, issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Sections 8 (a) (1) and 2 (6) and (7) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief, and Truck Drivers and Helpers Local Union 728, the Charging Party, filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs of the Respondent and of the

Charging Party, respectively, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Georgia Highway Express, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

It Is Further Ordered that the complaint herein, insofar as it alleges that the Respondent violated Section 8 (a) (3) of the Act, be, and it hereby is dismissed.

Dated, Washington, D. C., June 19, 1967.

.....
GERALD A. BROWN, Member,

.....
HOWARD JENKINS, JR., Member,

.....
SAM ZAGORIA, Member,
(Seal) NATIONAL LABOR RELATIONS BOARD.

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No. 440

In the Supreme Court of the United States

OCTOBER TERM, 1968

GEORGIA HIGHWAY EXPRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A5) is not yet officially reported. The Board's decision and order (Pet. A7-A28) are reported at 165 NLRB No. 80.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1968, and a petition for rehearing was

denied on May 28, 1968 (Pet. A2, A6). The petition for a writ of certiorari was filed on August 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the employer had failed to establish that it had permanently replaced economic strikers prior to their unconditional application for reinstatement.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 146, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set forth at page 3 of the petition.

STATEMENT

The Company, a motor freight common carrier, operates a terminal at Atlanta, Georgia (J.A. 292; 277, 284, 9).[1] On the evening of April 12, 1966, at about 9:00 p.m., 49 dock employees on the second shift, who were not represented by a labor organization, began a strike to protest against their working conditions (J.A. 293; 8, 10, 22-28, 39, 19, 287, 166, 235, 239-240, 89). Picket lines were established at each of the terminal entrances, with five or six employees carrying signs reading "On strike" and "Georgia Highway

[1] "J.A." refers to the Joint Appendix to the Briefs in the court below.

Express Unfair To Labor" (J.A. 294; 29-30, 159, 211). Some dock employees reporting for work on the Company's two succeeding shifts, beginning at 1:30 a.m. and 8:30 a.m., refused to cross the picket line, and by the following morning, April 13, the number of strikers had increased to 116 (J.A. 294, 299; 12, 19-20, 288-289, 31-32, 235, 239-241, 89-90, 97-98).

On the morning of April 13, all of the strikers who were not picketing went to the Union [2] hall, where virtually all signed union authorization cards (J.A. 295; 41-42, 55, 211). The Union advised the strikers to apply for reinstatement, and, about noon, after they had returned to the terminal, they decided to terminate the strike. Through a spokesman, Willie Hamm, they offered unconditionally to return to work. After Division Manager Young and Vice-President Dillon Winship, Jr. conferred privately, Young advised the strikers that the Company's attorney was out of town and that no immediate decision could be made (J.A. 295-296; 10-14, 28-29, 57, 42, 56, 72-75, 198). The Company made no claim at that time that the strikers had been replaced (J.A. 296; 14-15, 198). No strikers were reinstated until the period April 18 through April 21, when a total of 48 strikers, including Hamm, were taken back (J.A. 297; 235, 15, 31, 241-242, 91, 172-173). In the ensuing months, additional strikers were offered reinstatement (J.A. 298; 92, 249-250, 38-39, 47-48).

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[2] Truck Drivers and Helpers, Local No. 728, International Brotherhood of Teamsters.

Before the Board, the Company contended that it was not obligated to reinstate the strikers because it had replaced 75 of them prior to their applications and, due to a rerouting of freight, it had no work for the remainder. It sought to support this contention by exhibits showing in conclusionary terms, that 75 new employees had been hired on April 12 and prior to noon on April 13, 1966 (J.A. 235, 244-248), and by the testimony of Division Manager Young (J.A. 167) that he had ordered the hiring of replacements stopped at noon on April 13. However, the Company's exhibits did not show the time when the alleged replacements were hired or reported for work; the person who prepared the exhibits testified that he had not examined any records which showed the hour of hire of any employee (J.A. 300; 123-126); and the Company did not introduce time cards which could have established the time when the new employees reported. Nor did the Company call any supervisor to confirm that he received or followed such an order from Young, or any replacement to testify as to his actual time of hire.[3] Moreover, 21 of the alleged replacements were not new employees but transferees from other operations of the Company, and 16 of them returned to their original terminals shortly after the strike ended (Pet. A16-A18).

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[3] Striker Hamm, whom the Examiner credited, testified that he was present at the site of the picketing from about 9:15 p.m. on April 12 to about 11:00 a.m. on the next day, and that he did not remember seeing anyone unfamiliar enter the Company's premises (Pet. A20, n. 10; J.A. 36-37, 211-213).

The Board concluded that the Company had not established that the strikers had been permanently replaced when they applied for reinstatement on April 13, and that the Company thus violated Section 8(a)(1) of the Act by refusing to reinstate them at that time (Pet. A19-A21). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement to any of the striking employees who had not yet been reinstated, to make the strikers whole for any loss of pay suffered as a result of the Company's unlawful conduct, and to post appropriate notices (Pet. A24-A25).

The court of appeals sustained the Board's findings and conclusions, and enforced its order in full (Pet. A1-A4).

ARGUMENT

In *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378, this Court held that, "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice"; and the "burden of proving justification is on the employer." Petitioner sought to defend its refusal to reinstate the strikers, when they offered to return to work at noon on August 13, principally on the ground that it had hired 75 permanent replacements. However, the Board found, and the court below agreed, that petitioner had not sustained its burden of establishing that the replacements were hired prior to the strikers' application for rein-